No. 89-640

In The

Supreme Court of the United States

October Term, 1989

MANUEL LUJAN, JR.,
Secretary of the Interior, et al.,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

RONALD A. ZUMBRUN
ROBIN L. RIVETT
*JAMES S. BURLING
*Counsel of Record
PACIFIC LEGAL FOUNDATION
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae, Pacific Legal Foundation

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INTEREST OF AMICI

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioners. Written consent to the filing of this brief has been granted by counsel for all parties. Copies have been lodged with the Clerk of the Court.

PLF is a nonprofit, public interest law firm based in Sacramento, California, with a branch office in Anchorage, Alaska. PLF has over 20,000 supporters throughout the United States and has the primary purpose of litigating in the public interest and in the defense of individual freedoms, private property rights, and the free enterprise system. PLF is currently representing a variety of public interest litigants in federal litigation.

For example, PLF is representing several mining associations in Alaska in litigation brought by a coalition of environmental groups led by the Sierra Club over the proper management and regulation of small placer gold mines on certain federal lands in Alaska. PLF is representing mining associations in a challenge to the Environmental Protection Agency's (EPA) water quality regulations. PLF is currently representing California water districts in a dispute over federal water allocation in the central valley. PLF has represented timber producers in cases dealing with timber practices and environmental regulation. And it has represented ranchers in litigation over the environmental regulation of cattle grazing.

These environmental cases are a primary reason for the existence of the Foundation—to represent in environmental cases the public's interest in sound resource development. More often than not, the Foundation represents organizations who have intervened in litigation originally brought by environmental groups against the federal government. The doctrine of standing is crucial to each one of these cases. The terrible expense and uncertainty engendered by these lawsuits places a substantial burden on many members of the public—but

especially on consumers and public land users such as cattlemen, miners, and loggers.

The Foundation's interest in the outcome of this lawsuit is directly tied to its ability to support the public's interest in environmentally sound resource development. The organizations represented by PLF intervened in the cases described above because the federal government, with its many conflicting statutory mandates, is often not in a position to represent the actual public land users—as opposed to the federal public land regulators.

Similarly, the Foundation often finds itself representing parties in bringing suit *against* the federal government. Here too, standing is a crucial issue. While PLF supports the federal government in the present case, PLF's interests are not always coincident with those of the government. It is likely that PLF is more concerned than the federal government with upholding the public's right to sue the government—when there is someone or some organization that is directly and recognizably injured by a federal policy.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED, AND STATEMENT OF THE CASE

Amicus curiae, Pacific Legal Foundation, relies upon and adopts petitioners' statement and description of the opinions below, jurisdiction, statutes involved, and statement of the case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case involves 180 million acres of federal land and whether respondents have standing to sue based on allegations of use "in the vicinity" of 4,500 acres.

Federal litigation has almost become a panacea to all the world's ills—major and minor. The axiom "don't make a federal case out of it" has become meaningless. The involvement of the federal courts in just about every aspect of the affairs of the republic and the lives of its citizens has almost become a fait accompli.

It was fear of this very trend that stirred heated debate during the ratification of our Constitution. There was a sizable faction that believed that the federal judiciary would usurp the power of the states. The opponents to ratification were reassured, however, that this was not the intent of the document, and that the structure of the Constitution would prevent such usurpation. And until recent times, the federal courts respected the fears of the anti-federalists. The courts moved cautiously before entering into an arena that could conceivably be considered more appropriately in the province of the executive or the legislative branch of government.

Yet times have changed. The federal government has legislated in subjects and fields that would have been an anathema, or at least inconceivable, 200 years ago. And with the legislation, the federal courts have followed. This is as it should be because the courts are necessary to enforce, interpret, and, when necessary, curtail federal legislation wherever it is found.

But just because the federal judiciary has found it necessary to become involved in an unprecedented array of controversies, does not give it license to exercise unlimited jurisdiction. It does not have the power to rush pell-mell into all manner of controversies simply on the basis of a few allegations of a highly attenuated "interest" from a few discontented individuals. It does not have the power to be the ultimate resolver of every dispute imaginable. Instead, the jurisdiction of the courts extends no further than that granted by the Constitution and Congress.

In public land cases, individuals with an economic stake in the outcome of the litigation have standing. Others do not unless some other plainly discernible interest is presented.

The present case is a prime example of the danger of unlimited jurisdiction run amok. When a vaguely worded affidavit by one individual can provide sufficient basis to throw the management of 180 million acres of federal land into a tailspin, the courts have gone too far. The decision below must be reversed.

ARGUMENT

A. The Framers of the Constitution Envisioned a Powerful Judiciary—Which Would Not Usurp the Power of the Other Branches of Government

Our federal Constitution was not ratified without some trepidation. Having so recently thrown off the shackles of one tyrannical government, we were not

ready to embrace another. This fear of renewed tyranny was at the heart of the debate over the ratification of our Constitution. It was this debate that shaped the final structure and understanding of the Constitution.

The anti-federalists were fearful of the federal judiciary. We recognize in hindsight that many of the fears were unjustified, or that the benefits of a strong judiciary have outweighed the supposed harms. Nevertheless, an understanding of the fears expressed during the ratification debates helps explain the considerations that, until recent times at least, shaped the role played by the courts in the exercise of only limited jurisdiction.

The fears of the anti-federalists were centered on two interconnected attributes of the judiciary: its independence and the accompanying power to usurp both the states' and the federal government's legislatures.[1]

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[1] The problem of the judiciary overwhelming state sovereignty is not directly germane to the issues in the present case. The fear of such usurpation, however, is an essential element to an understanding of the overall reservations to an all-powerful judiciary. For example, Brutus wrote:

> "Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial." Brutus, "Essay XV" (Mar. 20, 1788) *reprinted in The Anti-Federalist* 186, ¶ 2.9.195 (Storing ed., as abridged by Dry 1985).

Similarly, according to the Pennsylvania minority:

> "The judicial powers vested in Congress are also so various and extensive, that by legal ingenuity they may be extended to every case, and (continued)

Concerns over the perceived excessive independence of the judiciary are embodied in remarks such as these by Brutus:

> "[The framers] have made the judges *independent*, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself." Brutus, "Essay XV" (Mar. 20, 1788) *reprinted in The Anti-Federalist* 183, ¶ 2.9.189 (emphasis in original).

Alexander Hamilton, however, saw the nature of the independent judiciary in a different light. He saw it as a necessary counterforce to the Legislature:

> "In a monarchy [an independent judiciary] . . . is an excellent barrier to the despotism of the prince: In a republic it is a no less excellent barrier to the encroachments and oppression of the representative body." *The Federalist No. 78*, 393 (May 28, 1788) (A. Hamilton) (Bantam ed. 1982) (The Federalist).

In a similar vein, Hamilton quoted Montesquieu for the truism that " 'there is no liberty, if the power of

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> thus absorb the state judiciaries, and . . . effect a consolidation of the states under one government." "The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents" (Dec. 18, 1787) *reprinted in The Anti-Federalist* 212, ¶ 3.11.28 (Storing ed., as abridged by Dry 1985).

judging be not separated from the legislative and executive powers.' " *Id.* at 394 (quoting Montesquieu, *Spirit of Laws*, Vol. 1 at 181).

It is this view that ultimately prevailed as exemplified both by the ultimate passage of the Constitution and in the seminal case *Marbury v. Madison*, 5 U.S. 137 (1803). Thus the independence of the judiciary would allow it to act as a countervailing force to the Legislature.

But stating that the judiciary should be independent from the Legislature is not enough. The question remains —what is the precise relationship between the two bodies? What is to keep the judiciary from usurping the will of the Legislature? It is apparent that Hamilton was unimpressed by such concerns:

> "It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power; *from the objects to which it relates; from the manner in which it is exercised*; from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check . . . the power of instituting impeachments."[2] *The Federalist*

[2] The tenor of the present case, of course, involves more of an usurpation of the power of the executive—who does not have the independent power to impeach the judiciary.

> *No. 81*, 411 (May 28, 1788) (A. Hamilton) (emphasis added). *See also The Federalist No. 78*, 396.

Of course, one of the most powerful checks upon judicial usurpation of legislative authority has been the judiciary's exercise of self-restraint—the "objects to which it relates; from the manner in which it is exercised." *Id.* at 411. The doctrine of standing is a key element of this self-restraint.

It is the exercise of such self-restraint that helps still the fears that were expressed by the opponents of the Constitution. Brutus noted that the courts would interpret the Constitution, not necessarily according to its letter, but to its "spirit and reason." Brutus, "Essay XII" (Feb. 7, 1788) *reprinted in The Anti-Federalist* 169, ¶ 2.9.149. Brutus believed that this inclination would lead to a troubling and unlimited exercise of jurisdiction where

> "[t]he courts . . . [will] take cognizance of every matter, not only that affects the general and national concerns of the union, but also of such as relate to the administration of private justice, and to regulating the internal and local affairs of the different parts." Brutus, "Essay XII" (February 7, 1788) *reprinted in The Anti-Federalist* 169, ¶ 2.9.150.

See also Centinel, "Letter 1" (Oct. 5, 1787) *reprinted in The Anti-Federalist* 17, ¶ 2.7.14 (on the sophistry used by English courts to extend jurisdiction).

In hindsight, more often than not the assurances of Alexander Hamilton on the power of the judiciary have proven to be more prescient than the fears of Brutus or the other opponents to ratification.

But with the present case, it is time to reexamine the efficacy of the doctrine of judicial self-restraint. The judiciary's usurpation of the power of another branch of government is apparent when a District Court takes on a case involving the management of 180 million acres of federal land—when the plaintiffs have been unable to demonstrate *any* distinct and unambiguous interest in the land. In such a case the doctrine of standing must be rigorously applied—in order to avoid the very result feared over 200 years ago during the ratification debates.

B. The Doctrine of Standing Is an Essential Element to Judicial Self-Restraint and the Avoidance of Usurpation of Power

1. Standing Should Be Denied to Persons Without an Actual Stake in the Controversy at Hand

Traditionally, federal courts have refused to hear a cause of action unless an actual case or controversy has been presented. In order for there to be standing to bring suit, federal courts have established an "injury-in-fact" test to determine whether there is sufficient adversity to meet the requirement that there has been an actual case or controversy. As articulated by this Court in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982): "It tends to assure that the legal question presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."

The specific "injury-in-fact" requirement precludes the presence of standing for a generalized grievance that is common to all citizens—such as disagreement with general land management policies. Thus "the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge*, 454 U.S. at 475 (quoting *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975)). *See also United States v. Richardson*, 418 U.S. 166, 180 (1974); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217-18 (1974) (no standing for an "interest as 'undifferentiated' from that of all other citizens"); *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

The finding of whether an injury-in-fact actually exists, or whether a party has a personal stake in the outcome of the litigation, has been distilled into a three-part test by this Court. First, there must be a "distinct and palpable" injury to the plaintiff, *Warth v. Seldin*, 422 U.S. at 501, be it "threatened or actual," *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973). Second, there must be a " 'fairly traceable' causal connection" between the injury and the challenged conduct of the defendant, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976). Third and finally, there must be a "substantial likelihood" that the relief requested will redress or prevent the injury. *Duke Power*, 438 U.S. at 45; *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 264 (1977).

An additional and related requirement that must be met is that the party claiming to be aggrieved must lie

within the "zone of interest" protected by the statute or constitutional provision. *Valley Forge*, 454 U.S. at 475; *Simon*, 426 U.S. at 39 n.19; *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

Unlike the actual users of the public lands (such as miners, loggers, and cattlemen) respondents have met none of these tests in the present case. As ably demonstrated by petitioners, an allegation that a person uses land "in the vicinity" of an area affected by a land management decision is not at all specific enough to demonstrate any actual or potential injury. Second, because over 99% of the subject land has always been open to mineral entry, there is no showing of any "fairly traceable causal connection" between the federal action and any further "injury." (There has always been potential mineral activity "in the vicinity" of the respondents' affiant.) Third, even if the respondents were ultimately successful in closing the 4,500 acres to mineral entry, there is no showing of any "substantial likelihood" of relief—because there will always be potential mineral activity on the public lands, in the vicinity of these 4,500 acres, which might "injure" respondents.

In short, respondents' allegations of injury and standing border on the trivial, absurd, and almost metaphysical. The allegations even fall outside the case that established the outer limits of standing: *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). It should first be noted that *SCRAP* primarily involved standing under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331. Many of the allegations in the present case revolve around the Federal Land Policy and Management Act (FLPMA),

43 U.S.C. § 1714, which has a much narrower scope than the "human environment" of NEPA. Whether respondents fall within the "zone of interest" of NEPA does not necessarily mean they fall within the "zone of interest" of FLPMA.[3]

In any event, great caution must be taken before extending the *SCRAP* principles beyond the facts of that case. NEPA involves an extraordinary breadth of human affairs—the whole human environment. NEPA is typical of modern federal statues that have expanded the sphere of federal influence well beyond anything envisioned 200 years ago. This trend requires that the judiciary exercise caution lest its jurisdiction extend beyond the already enlarged sphere of federal involvement. Thus, it would be an unwise extension of federal judicial power to confer standing on any person concerned about the human environment just because there is some federal action with a tenuous relationship to that human environment. With such unfettered jurisdiction, there would be nothing left of judicial self-restraint. The fears of the opponents of ratifying the Constitution would then be finally realized, despite the most sincere assurances of Hamilton.

2. Standing Should Be Preserved for Public Land Users with an Actual Stake in Litigation

The argument that standing should not be extended to people with mere generalized grievances over the state

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[3] Indeed, *SCRAP* may represent something of an anomaly that should be confined to its facts. That is to say, *SCRAP* involved issues of recycling at a time when the interrelationship between tariff rates, recycling, and the use (continued)

of the human environment does not mean that individuals with plainly tangible interests in the outcome of litigation should not be granted standing. In public land cases such as the present one, there are potential parties that are especially deserving of standing--those individuals and organizations who actually use the public lands to earn a living and who have a clearly defined economic stake in the lands. Thus holders of mining claims, timber leases, or grazing permits have the requisite interest for standing in suits that will affect those claims, leases, or permits.

If standing were not allowed for such economic interests, there would be an untenable extension of federal power over the liberty of these miners, loggers, and ranchers. This extension of federal powers would be without recourse to the courts. Hamilton's promise of a counterforce to the "encroachments and oppression of the representative body" then would not be realized. Judges would no longer be "an essential safeguard against . . . injury of the private rights of particular classes of citizens, by unjust and partial laws." *The Federalist No. 78* at 397-98.

The doctrine of standing must be revitalized. Parties that have a clear and unambiguous stake in the outcome of a lawsuit should be granted the ability to participate in federal legislation. Parties without such an interest should take their grievances elsewhere.

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of the out-of-doors in the Washington, D.C., area may have been more manifest than it is today.

Similarly, parties with a definite economic stake in the outcome of ongoing litigation should be liberally permitted to intervene. Thus, the principles of standing and intervention should have been construed in favor of parties such as ASARCO in the present case. Likewise, when loggers are affected by NEPA-based arguments, as they were in *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), *cert. denied*, 109 S. Ct. 3229, the loggers should be allowed to participate in the litigation. (They were not allowed in *Portland Audubon*.) A principle should be established that those who actually earn a livelihood from the public lands have at least as much right to participate in litigation as those who have only the most attenuated environmental interests.

CONCLUSION

Judicial self-restraint, as embodied in the doctrine of standing, is vital if the fulfillment of Hamilton's promise of a benign judiciary is to be maintained. If, however, standing is to be granted for all manner of abstract, theoretical, and fanciful claims, then there will be no territory of human endeavor beyond the jurisdiction of the courts. And if the jurisdiction of the courts is to be without limit, then we will finally be embarking upon a voyage to the land of tyranny as described by the anti-federalists two centuries ago.

Standing should be denied to parties without a clear and discernible interest in the stake of litigation. The decision of the court below should be reversed.

DATED: March, 1990.

Respectfully submitted,

RONALD A. ZUMBRIN
ROBIN L. RIVETT
*JAMES S. BURLING
*Counsel of Record
PACIFIC LEGAL FOUNDATION
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae,
Pacific Legal Foundation